NO. 20318

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUIS HERNANDEZ,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant U. S. Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant U. S. Attorney,
Assistant Chief, Criminal Division,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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Attorneys for Appellee,
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APPELLEE'S BRIEF

1.

JURISDICTIONAL STATEMENT

Appellant, Luis Hernandez, was indicted by the Federal Grand Jury for the Southern District of California on April 29, 1964, in District Court Case No. 33606-CD. [C. T. 2]. [1] The indictment charged six counts involving violation of Title 21, United States Code, Section 174, sale and concealment of heroin.

Appellant was arraigned, entered pleas of not guilty [C. T. 18] and on August 18, 1964, after first waiving jury, was found guilty by the court, as charged on all counts [C. T. 22-23].

On August 28, 1964, appellant was sentenced to five years imprisonment on each of Counts One and Two, the sentences to run

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[1] "C. T." refers to Clerk's Transcript of Record.

consecutively, and five years on each of Counts Three, Four, Five and Six, the sentences to run concurrently with those imposed on Counts One and Two [C. T. 25].

A timely notice of appeal from the judgment of conviction was filed on August 28, 1964 [C. T. 26]:

The jurisdiction of the District Court rests on Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 174. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 21, United States Code, Section 174, provides in pertinent part as follows:

> "Whoever fraudulently or knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought into the United States contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than 20 years, and in addition may be fined not more than $20,000 . . .
>
> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the

defendant explains the possession to the satisfaction of the jury."

III

STATEMENT OF THE CASE

A. DISTRICT COURT PROCEEDINGS

Appellant, having been indicted by the Federal Grand Jury on April 29, 1964, [C. T. 2] was arraigned in the District Court on May 25, 1964 and pleaded not guilty to the six count indictment [C. T. 18], which indictment charged, in summary, as follows:

Count One: that on or about March 31, 1964, in Los Angeles County, within The Central Division of The Southern District of California, appellant knowingly and unlawfully received, concealed, and facilitated the concealment and transportation of heroin, which as appellant knew, previously had been imported into the United States of America contrary to law.

Count Two: that appellant knowingly and unlawfully sold and facilitated the sale to an undercover assistant of the Federal Bureau of Narcotics, of heroin, which as appellant knew, had been imported into the United States of America contrary to law.

Counts Three and Four: paralleled the respective charging language of Counts One and Two, dealing however with a different quantity of heroin and referring to activities on or about April 2, 1964.

Counts Five and Six: similarly paralleled the respective charging language of Counts One and Two, dealing again with a different quantity of heroin and referring to activities on or about April 3, 1964.

On June 1, 1964, appellant filed a motion for bill of particulars, [C. T. 8], which having been opposed by appellee [C. T. 11], was denied by the court on June 15, 1964 [C. T. 19].

On August 7, 1964, appellee filed its Trial Memorandum in the case, which in its "Summary of the Government's Evidence" section, detailed the dates, times and other details relating to the several charges of the indictment [C. T. 28].

On August 18, 1964, court trial before the Honorable Thurmond Clarke commenced, jury having first been waived [C. T. 22].

At the conclusion of the Government's case in chief, counsel for appellant requested a continuance for the purpose of calling three defense witnesses, one who was said to reside in Los Angeles, another whose exact whereabouts were unknown, but who was believed to be in Chihuahua, Mexico, and a third who was said to reside in San Francisco. Counsel for appellant argued to the court that because the court had previously denied his motion for bill of particulars as to the precise times and dates of the offenses, counsel had no idea who was going to testify against appellant [R. T. 245-246]. The only stated purpose by counsel for appellant for calling such witnesses was that "These witnesses would testify to I think a very material fact, that is a

conversation, a disagreement between the defendant and the informer in this case." [R. T. 246].

As counsel for appellee pointed out to the trial court, the trial memorandum filed by the Government in the court below, eleven days prior to the commencement of trial, indeed spelled out with specificity the exact times, dates, relative to each of the several transactions [R. T. 247, C. T. 28, et seq.].

It was also noted below that at no time had appellant's counsel caused any subpoenas to be issued by the Clerk of the Court, for the mysterious three witnesses, their names being obviously familiar to appellant's counsel, even though no mention was otherwise made during the course of the trial [R. T. 271].

The motion for continuance was denied. [R. T. 247].

Although the court immediately upon the completion of all of the evidence in the case announced its judgment of guilty as to all counts, upon the request of appellant's counsel to be heard in argument, the court vacated its ruling and listened to argument [C. T. 23; R. T. 272-273]. Thereafter appellant was found guilty as charged on all six counts [R. T. 277].

On August 28, 1964, appellant was sentenced to five years on each of Counts One and Two, the sentences to run consecutively, and five years on each of Counts Three, Four, Five and Six to run concurrently with the sentence imposed on Counts One and Two, for a total period of ten years [C. T. 25].

Appellant filed timely notice of appeal on August 28, 1964 [C. T. 26].

B. STATEMENT OF FACTS

At approximately 10:00 A. M., March 31, 1964, according to the testimony of Michael Kanavalov, Kanavalov met appellant Luis Hernandez and appellant's brother at a cafe near Whittier Boulevard and Lorena in Los Angeles, California. In the ensuing conversation Kanavalov told appellant that he had been " . . . purchasing heroin from someone that was no good . . . " and asked appellant if there would be any possibility of his purchasing heroin from appellant [R. T. 38-39, 78]. Following additional conversation appellant replied in the affirmative and told Kanavalov to meet him, with one Munoz, later the same evening [R. T. 39]. [2/]

Thereafter Kanavalov had a meeting with Federal Bureau of Narcotics Agents Frost and Garcia at approximately 6:00 - 6:30 P. M., at which time a radio transmitting device was placed on Kanavalov's person and he was searched by the agents and provided with $120 of Government money [R. T. 39-41].

Kanavalov then proceeded to Whittier Boulevard, looked for appellant in Marty's Bar, inquired as to whether the bartender had seen him, and not finding appellant, Kanavalov walked to the corner of Whittier and Lorena where he stood waiting. After about ten minutes, or at about 7:00 p. m., Kanavalov heard and saw appellant whistle and motion to him. Appellant was at this time waiting at a location just south of Whittier Boulevard. Kanavalov walked over to appellant and told him that he had come to purchase some heroin.

[2/] "R. T." refers to Reporter's Transcript of Proceedings.

After a brief discussion, appellant told Kanavalov "O.K. . . . Go down to 7th and Lorena and wait for me at this little cafe." [R. T. 45].

Kanavalov then walked to the cafe and ordered a cup of coffee. In a few minutes appellant (known by Kanavalov also as "Indio") then called for Kanavalov to come outside. Kanavalov departed the cafe, met with appellant, and together they sat down on the curb in front of the cafe. Appellant asked Kanavalov if he had the money, and Kanavalov replied in the affirmative and handed appellant the $120 he had earlier been provided by Agents Frost and Garcia [R. T. 47]. This was the only paper money which Kanavalov had at the time. The two men then stood up and appellant told Kanavalov that "That stuff is across the street." Upon walking across the street, appellant kicked an object and said "There it is." Kanavalov picked the object up. It was wrapped in blue-green paper and felt as though it contained some rubbers. The two men separated and Kanavalov thereafter met with Agents Garcia and Frost and handed them the object. This was later determined to contain two rubber contraceptives containing heroin [Exhibit 1 Series; R. T. 20].

Kanavalov further testified that on April 2, 1964, at approximately 3:30 p.m., he again met appellant at Marty's Bar and appellant again agreed to sell heroin to him. They arranged to meet between the hours of 6:00 and 7:00 p.m., the same evening [R. T. 51-52].

Kanavalov again contacted Agents Frost and Garcia who picked him up at approximately 6:00 p.m., and drove with him

to the same general vicinity where he had previously purchased heroin from appellant on March 31. Kanavalov was again searched, provided with a radio transmitter and furnished $180 by the agents [R. T. 53-54].

Kanavalov then walked to Marty's Bar, looked for appellant and not finding him walked to a point just south of Whittier Boulevard and waited in front of a "TV shop". Appellant then called to Kanavalov from a neighboring parking lot. Kanavalov walked over to appellant and upon appellant inquiring as to how much heroin Kanavalov wanted, Kanavalov responded "three quarters" (defined by Kanavalov as the vernacular for three quarters of an ounce of heroin) [R. T. 56]. Appellant asked if Kanavalov had the money, and when Kanavalov responded that he did, the two men started to walk towards the adjacent alley. Upon appellant's request, Kanavalov gave him the $180. When they reached a point almost at the end of the alley, appellant reached down and picked up a package which had been residing next to a board on the ground [R. T. 57]. The package was wrapped in greenish-blue paper and contained three rubber balloons (or contraceptives). Kanavalov left appellant with the understanding that they would meet the next day. He then met with Agents Frost and Garcia and gave them the package [Exhibit 2 Series]. The powdery contents of these contraceptives were later determined to contain heroin [R. T. 24].

Kanavalov testified that he met once again with appellant on April 3, 1964, at approximately 7:00 p. m., at Marty's Bar. He again told appellant that he wanted to buy some heroin but that he

didn't have all of his money together yet. Appellant agreed to meet with him in about an hour or an hour and one half at the little coffee shop at 7th and Lorena [R. T. 61-63].

Kanavalov then got in touch with Agents Frost and Garcia and a short time later the agents picked Kanavalov up at his home, searched him, placed a radio transmitter on him and furnished him with $240 of Government money. The agents then drove Kanavalov to the same vicinity where he had purchased heroin from appellant on the two prior occasions [R. T. 64-65]. Kanavalov walked to the designated meeting place and after waiting about fifteen minutes in the cafe, observed appellant, who was across the street, motioning for him to come over. Kanavalov did so and upon appellant's inquiry as to how much he wanted, Kanavalov replied that he wanted four "quarters" of heroin [R. T. 67-69]. Appellant asked Kanavalov for the money and Kanavalov gave him the $240. The two men then walked in a southerly direction on the east side of Lorena Street, toward Atlantic Boulevard. They stopped in front of a house, at which time appellant told Kanavalov to continue walking to the corner of Atlantic and to come right back, at which time appellant would then give him "the stuff" [R. T. 69]. Kanavalov did as he was told and as he was returning, appellant came out from alongside the house and handed Kanavalov a bag. The men separated and Kanavalov then met with the agents and gave them the package which was subsequently determined to contain four contraceptives of heroin [Exhibit 3 Series; R. T. 24, 70-72].

On none of the three occasions when Kanavalov met with appellant, did he have any money in his possession other than that which had been furnished by the agents, nor did he have any other narcotics in his possession than that received from appellant. Kanavalov also testified that at no time had he been promised any leniency or reward by any Government official to induce his testimony at trial. [R. T. 73-76].

On cross-examination, Kanavalov testified that he himself had been arrested by federal narcotics agents on a charge of possession of heroin some months previous to the instant transactions with appellant, that he had been released on $10 bail, and that he had been working for the agents for about nine months as an informant. Kanavalov had never been convicted of a felony. Kanavalov also testified that he received no money from any Government agent other than witness fees and a sum of $10 or $20 which he borrowed from an agent, signing a note to return same. [R. T. 79-83, 87-88, 101, 115-116].

On re-direct examination, Kanavalov testified that although on cross-examination he had testified to the general effect that he had been advised by the agents that if he cooperated with the Government, no indictment would be returned against him, actually no such language or promises were ever used or made by the agents; rather that it was his "hope . . . that no indictment would be returned." [R. T. 155-156]. Kanavalov also testified that he had never been told or promised that if he cooperated, no case would be filed against him. "They told me they actually weren't

promising me anything but it would help me." [R. T. 156]. He was not told, however, how it would help him [R. T. 156-157].

In addition to the instant case, Kanavalov had also worked in an undercover capacity with the federal agents in two other cases [R. T. 157].

Federal Bureau of Narcotics Agent Garcia, on cross-examination testified, inter alia, that he searched Kanavalov prior to each meeting with appellant and that "I went through his pockets. I put my hand in his pants pockets. I felt the top of his socks. I looked through the cuff of his pants, if they had cuffs. If he had a jacket, I would check the lining and check it inside of his pockets, and through his billfold" [R. T. 148].

Federal Bureau of Narcotics Agent Lawrence Katz, testified as to his surveillance of the vicinity of Whittier and Lorena Streets on the evening of March 31, 1964 (the first transaction). He testified as to observing the meeting between Kanavalov and appellant near that intersection, at which time the two men were seen to engage in a brief conversation. He subsequently saw Kanavalov walk to the cafe at 7th and Lorena, and then meet outside the cafe with appellant. The two men were observed squatting together in front of the cafe, apparently having a conversation. Katz testified that appellant and Kanavalov then walked across the street where, following another brief conversation, Kanavalov kneeled down near the curb, picked something up, resumed conversation briefly with appellant and then left appellant and walked northerly on Lorena Street [R. T. 165-170].

Federal Bureau of Narcotics Agent Chris V. Saiz also testified as to his surveillance activities as they pertained to appellant's meetings with Kanavalov. As to the March 31, 1964 meeting, Agent Saiz testified that he followed Kanavalov to the cafe on Lorena Street and observed that Kanavalov was inside the cafe; that a few minutes later appellant came up to the cafe and signalled Kanavalov to come out, by making a beckoning motion with his hand; that Kanavalov came out of the cafe and met with appellant and the two men squatted down near the curb in front of the cafe and engaged in a brief conversation during which time Kanavalov handed something to appellant; that appellant and Kanavalov then walked across the street to a place where appellant shoved or pointed at something with his foot, followed by Kanavalov reaching down and appearing to pick something up; and that the two men then separated with Kanavalov walking north on Lorena [R. T. 173-177].

Agent Saiz testified that on April 2, 1964, he again assisted Agents Frost and Garcia with their pending investigation and again established a foot surveillance in the area of Whittier and Lorena. He observed Kanavalov alone for a while in that vicinity after which time he saw appellant motion to Kanavalov to come to a point near the parking lot where appellant was waiting. The two men were then observed to walk across the parking lot during which time Kanavalov handed something to appellant. When they reached the east end of the parking lot Agent Saiz observed appellant stoop down next to a parking bumper, as if he were picking something up,

and then appear to hand something to Kanavalov. The two men then parted company [R. T. 178-181].

On April 3, 1965, Agent Saiz again conducted foot surveillance in the same vicinity, and at approximately 8:00 - 8:30 p.m., he saw Kanavalov standing in front of the cafe at 7th and Lorena Streets. Agent Saiz then observed appellant on the southeast corner of 7th and Lorena, diagonally across from the cafe, whistling and motioning to Kanavalov. Kanavalov then was seen to cross the street, meet with appellant and together with appellant walk south on Lorena, on the east side of the street. While so walking, Agent Saiz observed that Kanavalov appeared to hand something to appellant just as they were directly in front of what Agent Saiz believed to be appellant's house at 1026 Lorena. At that time appellant turned into the yard and Kanavalov continued walking in a southerly direction. Agent Saiz then observed Kanavalov continue walking to the corner of Lorena and Atlantic and then return northerly on Lorena until he again met appellant, who was exiting from the same yard where he had entered minutes before. Upon meeting with Kanavalov, appellant handed something to Kanavalov and Kanavalov then continued to walk in a northerly direction, with appellant once again returning into the yard or into the house [R. T. 182-184].

Federal Bureau of Narcotics Agent John A. Frost testified as to the meeting between Agent Garcia, Kanavalov and himself on March 31, 1964, at which time Kanavalov was searched, provided with a radio transmitter, and furnished with $120 of.

official advance Government funds. After proceeding to the alley at the rear of Marty's Bar on Whittier, Agent Frost maintained a surveillance and retained a receiving unit over which he was able to hear verbal transmissions by Kanavalov. Although Agent Frost heard Kanavalov's initial inquiries at Marty's Bar for "Indio", and subsequent comments by Kanavalov as to his progress as he was walking, Kanavalov thereafter walked out of radio range [R. T. 197-199]. Agent Frost was present subsequently when Kanavalov met with him and Agent Garcia, at which time Kanavalov delivered to Garcia the Exhibit 1 Series containing two rubber-contraceptives of heroin [R. T. 200].

Agent Frost testified that on April 2, 1964, together with Agent Garcia, he again met with Kanavalov, and after searching Kanavalov, placing a radio transmitter on Kanavalov's person, concealed under his shirt, and furnishing him with $180 official advance funds, the agents drove Kanavalov again to the same alley behind Marty's Bar. Agent Frost's car was equipped with a radio receiver capable of receiving transmissions from the transmitter on Kanavalov's person. Agent Frost then maintained his surveillance, and via the transmissions from Kanavalov, was able audially to follow Kanavalov into Marty's Bar and then to the corner of Whittier and Lorena [R. T. 201, 202]. After about fifteen minutes, Agent Frost heard the sound of a fire engine going by and then heard Kanavalov say "There's Indio; I am walking toward him." [R. T. 203]. Agent Frost testified as follows as to the ensuing meeting between Kanavalov and appellant [R. T. 203-204]:

"BY MR. SCHULMAN: You say you heard him meet someone. How did you hear him meet someone?

"A. My recollection is that Mr. Kanavalov said, 'I have been waiting for you,' and he says, "Yeah,' a male voice responded, 'Yeah.'

"He said, 'There must have been a fire somewhere.'

"Then my recollection is that Mr. Kanavalov -- Then, the other male voice said, 'How many do you want?'

"Mr. Kanavalov said, 'Three.'

"He said, 'You got the bread, (do you have the money?')

"And Mr. Kanavalov said, 'Yes.'

"And I heard him count $180. I heard the sound of movement, walking.

"I then heard Mr. Kanavalov, as he walked away, transmitting to me, 'I have it. I am walking up the street and going around the corner.' I then transmitted this information to the other agents, via radio, as to developments."

Thereafter Agent Frost met with Agent Garcia and Kanavalov and observed Kanavalov hand Agent Garcia a package wrapped in green paper containing rubber contraceptives with powdery heroin [R. T. 204].

Agent Frost also testified that on April 3, 1964, he met with Agent Garcia and Kanavalov and that again Kanavalov was searched, a radio transmitter was placed on his person, and that

Kanavalov was furnished with $240 of official advance advance [R. T. 205-206]. Agent Frost maintained a position of surveillance at 7th and Lorena Streets. Shortly thereafter he observed Kanavalov waiting at the corner of 7th and Lorena and then walking across the street. Agent Frost testified that while he was observing Kanavalov cross the street, he also heard Kanavalov say over the radio device "There's Indio, I am going over." [R. T. 206]. Agent Frost testified that he then saw and heard the following:

> "THE WITNESS: Mr. Kanavalov then crossed the street and joined Mr. Hernandez. On his approach, he said something to the effect that 'I have been waiting for you.'
>
> "He said, 'Yeah. How many do you want?'
>
> "He said, 'A piece', Mr. Kanavalov said, 'A piece.'
>
> "He said, 'Have you got the money?'
>
> "Mr. Kanavalov said, 'Yes.'
>
> "They walked south. I started to pick up radio interference and I moved my car at that time. I saw Mr. Hernandez. . . " [R. T. 206-207].

Agent Frost then testified that he moved his automobile to avoid radio interference, and in the process of doing so, saw the two men walking south on Jorena Street. Then, after driving around the block, he observed Kanavalov alone, walking north on Lorena, at a point just south of 1026 South Lorena Street. While driving north on Lorena from Atlantic, Agent Frost passed by

Kanavalov and again saw appellant coming from the south side of the house at 1026 South Lorena Street. Subsequently Agent Frost maintained surveillance on Kanavalov alone and then on appellant, after which he joined Agent Garcia and Kanavalov and with Agent Garcia examined a brown paper package containing four rubber contraceptives. The contraceptives contained heroin [Exhibit 3 series] [R. T. 204-209].

Federal Burea of Narcotics Agent Harrison D. Paulus testified that at approximately 9:00 p.m., April 14, 1964, together with Agent Harry Watson, he conducted surveillance in the vicinity of Lorena and Whittier. Shortly thereafter they observed appellant leave a residence at 3448 Whittier Boulevard, walk to a vehicle, pick up a package and return to the building. The agents proceeded to the front steps of the apartment and while there the door was opened by one Margaret Cerna. Agent Paulus identified himself and Agent Watson as agents of the Federal Bureau of Narcotics and advised the woman that they intended to arrest appellant. Then, seeing appellant sitting at a kitchen table, the agents arrested appellant and searched his person [R. T. 226-228]. Agent Paulus testified that at the time that they went to the building to arrest appellant, they were under instructions that there was a warrant outstanding for appellant's arrest [R. T. 229]. Agent Paulus also was aware of the various facts relating to the events of March 31st, April 2nd and April 3rd, involving appellant and Kanavalov [R. T. 229]: It was stipulated that in fact no warrants of arrest had in fact been

issued [R. T. 243].

Subsequent to the arrest and the search of appellant the agents searched the small apartment and found in excess of $1,200 hidden on the premises. Appellant, when confronted with the money denied that the money was his and stated that he did know whose it was. Miss Cerna similarly told the agents that she had no knowledge about the money or where it had come from [R. T. 231-234]. By comparison of the serial numbers on the various bills with lists of the serial numbers of the specific bills which had been advanced to Kanavalov on each of the three dates, March 31, April 2 and April 3, the agents determined that three one dollar bills had corresponding serial numbers as those on the list prepared relative to the monies advanced Kanavalov on April 2, 1964 [Exhibits 5 and 5A].

Appellant presented only himself as a trial witness on his own behalf. As a part of his direct testimony, appellant admitted the following: that he had known Kanavalov for more than a year; that during the latter part of March, 1964, Kanavalov asked appellant if he had any heroin and in response thereto appellant told him in effect to go away and not to bother him, and that after several inquiries, appellant then hit Kanavalov in the stomach [R. T. 248-251]. Appellant further testified that on March 31, Kanavalov again approached appellant and asked to buy one or two rolls of "bennies" (which appellant later defined as "pep pills" or benzedrine) [R. T. 261]. Appellant said that he agreed and told Kanavalov to meet him at the cafe. Appellant testified that he had

"three rolls of bennies", and thereafter unsuccessfully looked for Kanavalov and when he finally found him he told Kanavalov "that there was nothing doing." [R. T. 251-252]. Appellant further testified that he met Kanavalov again on April 2nd, and sold him "two rolls" [R. T. 252]; and that on April 3rd he again met Kanavalov who told appellant that he wanted a "piece", which appellant defined as being " . . . a bag with a thousand in them". According to appellant, Kanavalov gave appellant $3 on April 2nd for the two rolls. Appellant denied that he ever discussed the subject of heroin or ever sold or gave heroin to Kanavalov at any time, or that he himself had possessed any heroin during the period in question [R. T. 253-254].

On cross-examination appellant testified that he had previously sold heroin in 1956 to a State undercover agent and that he had also been convicted on a charge of selling "nine caps" of heroin [R. T. 254-256]. When asked to define "a quarter", appellant hedged and defined same as being "25 cents" [R. T. 255]. Similarly, when asked whether or not "a piece" means anything else in the narcotics jargon other than an ounce of heroin, appellant avoided a direct response by replying that " . . . a piece, a piece means anything . . . It means a lot of things . . . I can say a piece of candy, a piece of a girl." [R. T. 256-257].

Appellant also testified on cross-examination that on March 31, 1964, when Kanavalov asked appellant to sell him "bennies" he (appellant) was at that time engaged in the business of selling "bennies" to "a few people" [R. T. 258] and that he had no

[illegible]

[illegible]

[illegible]

other occupation [R. T. 257-258].

Appellant, contrary to the direct testimony of Kanavalov, Saiz and Katz, denied meeting with Kanavalov on March 31, 1964 in front of the cafe and squatting down at the curb with Kanavalov, or that he received any money from Kanavalov at such time; or that after crossing the street with Kanavalov at 7th and Lorena, he pointed at any object with his foot for Kanavalov to pick up. Appellant also testified that if Kanavalov bent down and picked anything up at that point, he appellant " . . . didn't notice." [R. T. 261].

According to appellant's testimony on cross-examination, when he met with Kanavalov on April 2nd, it was at this time that he went over "underneath the parking lot" to get "two rolls" from a place where he had hid them, and gave them to Kanavalov in exchange for three $1 bills [R. T. 262-263].

Appellant admitted that the $1200 recovered during the search was his, and that he had gotten it about three months earlier from a landscaping business. He also admitted, without explaining, that he did not normally keep money deposited in different hiding places around a house [R. T. 258-259].

Later in his cross-examination, appellant admitted that the term "a piece" as used on the street more commonly is used to mean an ounce of heroin than "a thousand bennies" [R. T. 264-265].

According to appellant, at the meeting on April 3rd, he did not deliver any heroin to Kanavalov, but rather after walking to his house and after Kanavalov returned from the corner, appellant

pointed to the ground to indicate to appellant where he had hidden a sack of 1,000 bennies, which he was selling to Kanavalov. Appellant testified that he received $40 from Kanavalov for these bennies, which was the going price at the time.

IV

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR BILL OF PARTICULARS.

Appellant filed a motion for Bill of Particulars prior to trial, in which he requested the following:

> "I. The exact place at which the alleged crime is alleged to have been committed.
>
> "II. The exact date and time at which each of the alleged crimes is alleged to have been committed.
>
> "III. The name or names of each person to whom defendant is alleged to have furnished or sold the narcotic heroin.
>
> "IV. The names of each and every person who was present at the time of the commission of the alleged crimes." [C. T. 8].

Although appellant states in his opening brief that "It was adduced that the above information was vital to the preparation of

an adequate defense", [3] such conclusion is mere presumptiousness on the part of appellant. There was absolutely no showing made by appellant of the existence of "cause" for the granting of the motion or wherein such information would be otherwise necessary to his defense.

A motion for a bill of particulars is addressed to the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal unless it has been abused.

> Yeargain v. United States, 314 F. 2d 881 (9th Cir. 1963);
>
> Wong Tai v. United States, 273 U.S. 77, 82; 47 S. Ct. 300, 71 L. Ed. 545 (1927);
>
> Schino v. United States, 209 F. 2d 67, 69 (9th Cir. 1954) cert. den. 347 U.S. 937;
>
> Kobey v. United States, 208 F. 2d 583 (9th Cir. 1953);
>
> Remmer v. United States, 205 F. 2d 277, 281 (9th Cir. 1953);
>
> Himmelfarb v. United States, 175 F. 2d 924 (9th Cir. 1949) cert. den. 338 U.S. 860.

Rule 7(f) of the Federal Rules of Criminal Procedure provides in pertinent part:

> "The court for cause may direct the filing of a bill of particulars."

The moving party has the burden of showing the existence of

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[3] Appellant's Opening Brief, page 3.

"cause".

United States v. Hudson, 176 F. Supp. 323
(D. C. M. D. Ga. 1959);
United States v. Callahan, 18 F. R. D. 486
(D. C. W. D. Wash. 1955).

It is not the function of a bill of particulars to lay before the defendant the Government's entire case in all its details and ramifications, or to compel the Government to disclose in advance of trial the evidence by which it will attempt to prove the charges alleged in the indictment.

Remmer v. United States, supra, at page 282;
Wong Tai v. United States, supra;
Todorow v. United States, 173 F. 2d 439 (9th Cir. 1949);
Frederick v. United States, 163 F. 2d 536, 545 (9th Cir. 1947), cert. den. 332 U. S. 775;
Robinson v. United States, 33 F. 2d 238, 240 (9th Cir. 1929);
Rubio v. United States, 22 F. 2d 766 (9th Cir. 1927).

In Nye & Nissen v. United States, 168 F. 2d 846, 851 (9th Cir. 1948), aff'd 336 U. S. 613, this Court stated:

> "The information requested * * * appears to concern the details of the evidence which was to be relied upon by the evidence which was to be relied upon by the government in support of its charges: the time, places and persons involved in various evidentiary transactions, etc.

> "* * * Although it may be true that defendants could not have known in advance of trial what various facts and circumstances were to be relied upon by the government * * *, this does not necessarily indicate that they were prejudiced by the denial of the motion. The government should not be compelled by a bill of particulars to make a 'complete discovery' of its entire case."

See also _United States_ v. _Mangiaracina_, 92 F. Supp. 96, 10 F.R.D. 415 (W.D. Mo. 1950).

And in _Yeargain_ v. _United States_, _supra_, it was held:

> "A defendant is not entitled to know all the _evidence_ the government intends to produce, but only the _theory_ of the government's case."

The proper function of a bill of particulars is to state _facts_ beyond those alleged in the indictment so that the offense involved is sufficiently identified (1) to enable defendant to plead a conviction or acquittal thereon in bar of a second prosecution for the same offense, and (2) to fairly apprise the defendant of the nature of the charge so that he may prepare his defense and not be prejudicially surprised at the trial.

Yeargain v. _United States_, _supra_;

Remmer v. _United States_, _supra_, judgment vacated and remanded on other grounds, 347 U.S. 227. Subsequent history not relevant.

Todorow v. _United States_, _supra_;

United States v. _Ansani_, 240 F.2d 216, 223 (7th Cir.

1957), cert. den. 353 U.S. 936;

<u>United States</u> v. <u>Lebron</u>, 222 F.2d 531 (2d Cir. 1955) cert. den. 350 U.S. 876;

<u>Kaufman</u> v. <u>United States</u>, 163 F.2d 404, 408 (6th Cir. 1947), cert. den. 333 U.S. 857;

<u>Sawyer</u> v. <u>United States</u>, 89 F.2d 139, 140 (8th Cir. 1937).

Appellant, relying on a procedural rule of the State of California, (Penal Code Section 943) urges that the indictment was itself faulty in that the names of the witnesses who appeared before the grand jury were not indorsed upon the face of the indictment. (Appellant's Opening Brief, page 13; citing <u>People</u> v. <u>Breen</u>, 130 Cal. 72 (1900) and other cases.) No attack was made upon the indictment below, and of course the state rule relied upon by appellant is quite contrary to the established rules of federal criminal procedure.

Rules 6 and 7, Federal Rules of Criminal Procedure, Title 18, United States Code.

As noted, <u>supra</u>, in appellee's Statement of the Case, appellee did voluntarily provide for appellant as a part of its trial memorandum, extensive detail as to the date, the time and other information relating to each of the several transactions. The appellant was entitled to no more.

It is submitted that the motion for bill of particulars was properly denied.

B. THE EVIDENCE PRESENTED AT TRIAL IS SUFFICIENT TO SUSTAIN APPELLANT'S CONVICTION.

Appellant has raised as "Point II" on this appeal a question which, as phrased, has no significance to the issues in this case. It is contended on page 16 of Appellant's Opening Brief that "The Informer, Because of His Background and Personal Interest, was not a Reliable Informer."

Although appellant purports to attack Kanavalov's reliability, no argument is even advanced by appellant wherein Kanavalov's purported non-reliability would be a basis for reversal of appellant's conviction. Appellant argues non-reliability in a vacuum.

This is not a case where physical evidence or confessions were obtained by searches and seizures, the only probable cause for which information was provided by a "reliable informer." The California cases cited by appellant for such a problem are thus inapplicable to the case at bar. No such evidence was <u>seized</u> during any of the instant transactions nor did appellant confess to or admit to any of the details of his crimes.

Cf. <u>Draper</u> v. <u>United States</u>, 358 U. S. 307 (1959);

<u>Costello</u> v. <u>United States</u>, 298 F. 2d 99 (9th Cir. 1962).

Nor can appellant here question Kanavalov's "reliability" in terms of credibility of belief by the trial court of Kanavalov's testimony. The credibility and the weight to be given their testimony is a matter within the province of the trial court which has seen and heard the witnesses.

<u>Stoppelli</u> v. <u>United States</u>, 183 F. 2d 391 (9th Cir.

1950), cert. den. 340 U.S. 864;

Norfolk v. McKenzie, 116 F. 2d 632 (6th Cir. 1941).

In this case the evidence overwhelmingly pointed to appellant's integral, willing and complete involvement in each of the three narcotics transactions upon which the indictment was premised. The trial court was not faced with balancing contrary opinions or evidence in any significant regard. The Government's case was firmly established by numerous percipient witnesses as to each of the details involved; and appellant's obvious false and fanciful testimony certainly evidenced and cinched the conclusion for the trial court that appellant was guilty as charged, on each of the six counts, beyond a reasonable doubt.

On appeal, when considering an attack upon the sufficiency of the evidence, the appellate court must view the evidence at trial taken in the light most favorable to the Government, together with all reasonable inferences which may be drawn therefrom.

Noto v. United States, 367 U.S. 290 (1961);
Glasser v. United States, 315 U.S. 60 (1942);
Stein v. United States, 337 F. 2d 825 (9th Cir. 1964);
Byrnes v. United States, 327 F. 2d 825 (9th Cir. 1964) cert. den. 377 U.S. 970.

If the court then finds substantial evidence, it must presume the findings of the trier of fact to be correct and the judgment must be sustained.

Noto v. United States, supra;
Ingram v. United States, 360 U.S. 672, 678 (1959);

Kotteakos v. United States, 328 U.S. 750, 763-764 (1946);

Glasser v. United States, supra.

The evidence was indeed sufficient to support the judgment of conviction.

C. APPELLANT'S ARREST WAS PROPER AND BASED UPON PROBABLE CAUSE.

Appellant raises in his Point III the concern that appellant was arrested without benefit of a warrant, and that at the time the arrest was made, the arresting agent was erroneous in his understanding and belief that an arrest warrant had been issued. [4]

Once again, appellant raises a procedural point without any direction as to the error alleged to have been committed by the court below.

Certainly under federal statutes federal narcotics agents are empowered to make an arrest without a warrant if they have reasonable grounds to believe that the person to be arrested has committed or is committing violations of the federal narcotics laws;

Title 26, United States Code, Section 7607;

Williams v. United States, 273 F. 2d 781 (9 Cir. 1959);

Santiago v. United States, 327 F. 2d 573 (2d Cir. 1964);

United States v. Volkell, 251 F. 2d 333 (2d Cir. 1958)

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[4] Appellant's Opening Brief, pages 17-18.

cert. den. 356 U.S. 962.

and, even in the absence of an applicable statute, inasmuch as the Supreme Court has held that " . . . the law of the state where an arrest without warrant takes place determines its validity", the arrest of appellant would quite properly have been justified under California Penal Code Sections 830 and 844.

Cf. People v. Maddox, 46 Cal. 2d 301 (1956), cert. denied 352 U.S. 85, 89.

That "reasonable grounds" or "probable cause" existed for appellant's arrest is beyond question - and appellant has not questioned same. These terms have been oft-defined, and the circumstances of this case, as known to the arresting agents at the time they made the arrest [R. T. 229], fully supports the conclusion that the arrest was proper. As stated in Brinegar v. United States, 338 U.S. 160 (1949), at page 175:

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
>
> "The substance of all the definitions 'of probable cause' is a reasonable ground for belief of guilt . . . (citations omitted) . . . And this 'means less than evidence which would justify condemnation' or conviction . . . Since Marshall's time, at any rate, it has come to mean more

than bare suspicion: Probable cause exists where 'the facts and circumstances within their [the officers] knowledge and of which they had reasonably trust-worthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed . . . . "

Draper v. United States, 358 U. S. 307 (1959);
Go-Bart v. United States, 282 U. S. 344 (1931);
Husty v. United States, 282 U. S. 694 (1931);
Dumbra v. United States, 268 U. S. 435 (1925);
Carroll v. United States, 267 U. S. 132 (1925).

Appellant's citation of Miller v. United States, 357 U. S. 301, 308 (1958) is misguided. The decision in that case related to an unlawful manner of making an arrest, i. e. breaking down a door and entering without the officers first stating their authority and purpose for demanding admission. In the instant case the door to the apartment had been opened by Mrs. Cerna just as the agents arrived on the front steps of the building. The agents properly identified themselves and announced their intention to arrest appellant. It was only then that the agents, in a non-forcible manner, entered the apartment and arrested appellant. [R. T. 227-228].

The arrest being lawful, the only fruits of the arrest, the three $1 bills, seized at Mrs. Cerna's house, were properly received into evidence.

United States v. Rabinowitz, 339 U. S. 56 (1950).

D. IT IS IMMATERIAL TO THIS CASE THAT AT THE TIME OF APPELLANT'S ARREST HE WAS NOT FULLY ADVISED OF HIS RIGHTS.

Appellant has again reached into the air; this time for the cloak of the Escobedo decision, and has claimed protection from its doctrine (United States v. Escobedo, 378 U. S. 478 (1964). In Point III of appellant's brief he complains that "At The Time Of His Arrest, Defendant Was Not Advised of His Rights". [5]

Appellant does not however suggest or even argue wherein this failure on the part of the arresting agents deprived appellant of a fair trial, or wherein such failure serves as a possible basis for reversal of appellant's conviction. Unlike Escobedo, and the cases which follow, dealing with the inadmissibility of confessions or admissions made by a defendant at a time when he was not fully advised of his right to counsel, we have no such "illegally obtained" evidence in this case. There were no confessions. There were no admissions.

The point is absolutely without merit.

E. APPELLANT WAS NOT DENIED THE RIGHT TO SUBPOENA WITNESSES.

As noted in appellee's Statement of the Case, appellant at no time prior to trial applied for or attempted to apply for the issuance of any subpoenas for defense witnesses.

Rule 45, Federal Rules of Civil Procedure.

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[5] Appellant's Opening Brief, pages 18-19.

It was only after the Government's case in chief had concluded that appellant's counsel asked for a continuance to secure the attendance of three persons, one residing in Los Angeles, another in San Francisco and a third somewhere in Chihuahua, Mexico. The names of these persons were obviously known to appellant and to his counsel, through independent means, there having been no reference or mention whatever of their names in the Government's case in chief.

Even after the completion of Kanavalov's testimony - the first day of trial - no effort was made by appellant to seek the issuance of subpoenas for any of these persons. Certainly if their testimony would have had any bearing on the case relating to possible impeachment of Kanavalov's testimony, or otherwise, such knowledge would have been clear to appellant and to his counsel at that time. Nor can appellant again rely on the court's refusal to grant a bill of particulars as basis for his claim that he could not foresee the need for these witnesses prior to the trial. The indictment and the Government's trial memorandum clearly set the stage for the transactions which the Government intended to prove.

The only relevance of the purported testimony of these three witnesses would have been, as stated by appellant's counsel, i. e., "These witnesses would testify to I think a very material fact, that is a conversation, a disagreement between the defendant and the informer in this case" (Emphasis added) [R. T. 246]. That such testimony would have aided appellant in disproving the

clear and heavily corroborated evidence of his being a trafficker in heroin, is most improbable. At the very most, perhaps, a showing might have been made to suggest a bias on the part of Kanavalov against appellant. But bias or not appellant did sell and conceal heroin as charged.

The case of Rogers v. United States, 340 U. S. 367, 370 (1960) cited by appellant, dealt solely with a contempt conviction arising out of the defendant's improper invocation of the Fifth Amendment. The decision has no bearing on the instant case.

The motion for continuance was properly denied, and appellant can claim no prejudice as a result of his failure to timely produce his witnesses.

F. THE COURT COMMITTED NO PREJUDICIAL MISCONDUCT IN RENDERING ITS JUDGMENT.

Appellant claims prejudice in that the trial court adjudged him to be guilty as charged. No further argument is made to specify wherein such prejudice occurred.

If what appellant is suggesting is that he was deprived of his opportunity to argue the case to the court, such a contention would be without support. It is true that at the completion of all of the evidence, the court without asking for argument from counsel, made its finding of guilt. It is similarly true, however, that upon being asked for the opportunity of argument, the court vacated its ruling and heard whatever argument counsel for appellant had to make. Thereafter , satisfied that its original judgment was correct, the judgment of guilty was once again

pronounced by the court. [R. T. 277].

Here the court had heard all of the evidence, sitting without a jury, in less than two days. As the court observed subsequent to its first ruling:

> " . . . We have run right through, and with the case in the court's mind, it is beyond any question of reasonable doubt, and I didn't see any need for argument. We started yesterday and we have had it today . . . "
> [R. T. 272].

Nevertheless, the court bowed to the request of appellant's counsel and permitted him to be heard and to argue his cause.

It is submitted that such a procedure would indeed be a weak basis for appellant to claim denial of "effective assistance of counsel", and that such a contention is indeed a frivolous effort to impugn appellant's conviction.

V

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant United States Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant United States Attorney,
Assistant Chief, Criminal Division,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael P. Balaban
MICHAEL P. BALABAN